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Reality

DREW S. DAYS, III*

I. INTRODUCTION

As quickly as the twinkling of an eye, Professor Epstein acknowledges dutifully America's history of discrimination against African-Americans and passes on.¹ This strategy is central to the overall scheme of his impressive assault upon Title VII.² For it is designed to persuade the reader that the history of discrimination has no significant impact upon the current socio-economic status of blacks and their chances for improving that condition, and that racial discrimination is largely a relic of the past. With this obstacle out of the way, the force of his overall argument, if not much of his rhetoric, about the blight of government regulation of discrimination in the workplace seems almost irresistible.

What could be fairer and more sensible, under these circumstances, than leaving it to the marketplace to bring willing employers and applicants together to make mutually beneficial deals? Why should black job-seekers care if some employers desire to discriminate, if they can easily find, or be found by, other employers (even other blacks) who will view their racial identity as irrelevant, if not a preferred characteristic? In any event, bottom-line considerations will ultimately cause most, if not all, of the firms that discriminate to go under. What could be more poetic? But for those who, like me, decline to accept Professor Epstein's invitation to dismiss history and ignore present realities, his argument loses much of its overall seductiveness.

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1. RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* 1 n.1 (1992) [hereinafter *FORBIDDEN GROUNDS*].

2. Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-5 (1988).

His second strategic move is to offer up an incorrect and unrealistic picture of how Title VII law works in racial, as well as in other, discrimination cases. Professor Epstein's fundamental quarrel is really not with the Supreme Court for "legislatively" expanding the application of Title VII beyond bounds set by Congress. Presumably, had he found the Court's rulings entirely faithful to the intent of Congress or had Congress ratified what the Court has done, he would still find Title VII unacceptable.

Nevertheless, since his argument for "deregulation" of employment discrimination requires exaggerating Title VII's warts, his story is one of largely unmitigated, inefficient government interference with employer freedom of contract. It fails to acknowledge that Title VII, although most assuredly a brake on unbridled employer discretion to hire, promote, and fire at will, does not ignore employer prerogatives altogether.

Professor Epstein's failure to take the history of racial discrimination seriously and to portray accurately the workings of Title VII law leads me to question whether the goal of *Forbidden Grounds* is truly to point America in the direction of greater employment opportunities for blacks. Rather, it seems more intent on disparaging a regulatory framework that, while hardly without its problems, continues to offer genuine prospects for economic growth and economic inclusion to those previously barred from meaningful representation in the workplace because of the color of their skin.

II. TITLE VII — THE HISTORICAL CONTEXT

Professor Epstein's thesis is that, freed of the formal strictures of Jim Crow laws and the informal pressures designed to maintain the regime of "separate-but-equal," firms would sort themselves out through market forces into those that operated on a racially non-discriminatory basis and those that did not. In time, he argues, that sorting-out process would likely result in most firms being driven by the bottom line to hire without regard to race. Those that persisted in excluding candidates would either fail or survive for idiosyncratic reasons.³ This attractive scenario of, in essence, the "withering away" of racial discrimination becomes rather problematic, however, when placed in the appropriate historical context. Put simply, what reason did Congress have to believe in 1964 that the market would effect a self-correction?

The answer, I would suggest, is almost nothing. Congress, unlike Professor Epstein, was sensitive to the organic character of racial discrimination in America. It recognized that movement with respect

3. FORBIDDEN GROUNDS, *supra* note 1, at 37-38.

to discrimination in employment would not likely occur without significant changes in housing, education, public accommodations, and voting. Those changes had not begun seriously by the time the Civil Rights Act of 1964 became law.

A. Before the Civil Rights Act of 1964

In the field of education, although *Brown v. Board of Education*⁴ had declared public school segregation unconstitutional a decade earlier, implementation of that decision in the Southern and border states was facing fierce resistance at the primary-secondary as well as higher education levels.⁵ In the meantime, black children were being denied the physical, financial, and human resources that would enable them to compete on an equal footing with their white counterparts. They were also unable to take advantage of formal and informal networks available to whites to facilitate their obtaining further training and employment.

Discrimination in the provision of public accommodations was also a problem — not only in the South but in other parts of the country as well. Blacks were consequently restricted in their ability to travel, generally, and to engage, more specifically, in seeking, accepting, and performing employment outside their home communities. Although there were state and local laws in some jurisdictions prohibiting discrimination in the provision of public accommodations⁶ and Supreme Court decisions had declared illegal certain forms of racial discrimination connected with interstate travel,⁷ no federal law dealt with the issue comprehensively.

The Supreme Court prohibited the enforcement of racially restrictive covenants in 1948,⁸ but discrimination in housing was widespread throughout the country. Congress would not address that issue until it enacted the Fair Housing Act of 1968.⁹ Segregation in

4. 347 U.S. 483 (1954).

5. See *Cooper v. Aaron*, 358 U.S. 1 (1958) (opposing desegregation of Little Rock public schools); CHARLAYNE HUNTER-GAULT, *IN MY PLACE* (1992).

6. See Marion A. Wright, *Public Accommodations: The Sit-in Movement: Progress Report and Prognosis*, in *LEGAL ASPECTS OF CIVIL RIGHTS MOVEMENT* 87 (1965); U.S. COMM'N ON CIVIL RIGHTS, *FREEDOM TO THE FREE: CENTURY OF EMANCIPATION, 1863-1963: A REPORT TO THE PRESIDENT 182-83* (1963); JOSEPH P. WITHERSPOON, *ADMINISTRATIVE IMPLEMENTATION OF CIVIL RIGHTS* 12, 467-68 (1968).

7. *Bailey v. Patterson*, 369 U.S. 31 (1962); *Boynton v. Virginia*, 364 U.S. 454 (1960); *Henderson v. United States*, 339 U.S. 816 (1950); *Morgan v. Virginia*, 328 U.S. 373 (1946); *Mitchell v. United States*, 313 U.S. 80 (1941).

8. *Shelley v. Kraemer*, 334 U.S. 1 (1948).

9. Fair Housing Act, Title VIII of the Civil Rights Act of 1968, 42 U.S.C.

housing limited the ability of black families to seek out communities where their children would be able to attend resource-rich majority white schools. To the extent that jobs were moving from areas of black concentration to largely white, suburban or rural communities, the unavailability of housing for blacks prevented them from moving along with the jobs, as could whites.¹⁰

The Civil Rights Act of 1957, the first such legislation since Reconstruction, attempted to break the stranglehold that the Southern political establishment had on blacks' efforts to exercise the franchise.¹¹ However, Congress became aware with the passage of further voting rights legislation in 1960 and 1964 that opponents of voting rights for blacks were effectively exploiting the litigation process to delay and frustrate any meaningful change in the status quo. It was not until 1965 that a federal law was enacted that shifted the burden of time and inertia from the victims of discrimination in voting to the perpetrators.¹² Consequently, it was not realistically within the power of blacks through the use of the political process to begin altering conditions that, even after the official fall of state-imposed racial segregation, perpetuated discriminatory practices. Moreover, white political control translated into limited employment opportunities for blacks within government and limited support for private black enterprises, in terms of grants and contracts.¹³

In the employment area, the federal government had, since the administration of Franklin Roosevelt, attempted to increase opportunities for blacks among firms to which it awarded contracts.¹⁴ However, since the policy had no effective enforcement mechanism, progress was rather slow and uneven.¹⁵ At the same time, federal grants were being awarded to state and local governments and private entities with no strings attached insofar as prohibitions against racial discrimination were concerned.¹⁶

One must add to this picture the widespread and violent resistance throughout the South to efforts of the Civil Rights Movement and

§§ 3601-3619 (1992).

10. DERRICK BELL, *RACE, RACISM AND AMERICAN LAW* § 9.1, at 592 n.19, 593 n.20 (2d ed. 1980).

11. Civil Rights Act of 1957, Pub. L. No. 85-315, 71 Stat. 634.

12. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified at 42 U.S.C.A. §§ 1971, 1973-1973p (1992)); *South Carolina v. Katzenbach*, 383 U.S. 301 (1966).

13. See generally Petitioners Brief for Fullilove v. Kreps, 448 U.S. 448 (1980) (No. 78-1007).

14. Exec. Order No. 8802, 41 Fed. Reg. 3109 (1941).

15. MICHAEL I. SOVERN, *LEGAL RESTRAINTS ON RACIAL DISCRIMINATION IN EMPLOYMENT* 103-42 (1966).

16. H.R. REP. NO. 914, 88th Cong., 2d Sess., pt. 2, at 24-26 (1964); Charles F. Abernathy, *Title VI and the Constitution: A Regulatory Model for Defining "Discrimination"*, 70 GEO. L.J. 1 (1981).

Dr. Martin Luther King, Jr. to eradicate racial segregation.¹⁷ All told, in 1964, Congress could see that the caste system of racial segregation and discrimination remained largely intact, despite earlier judicial and legislative assaults upon it. The Civil Rights Act of that year, consequently, was one that attempted to address barriers to equal opportunity for blacks not only in employment but also in voting, public accommodations, school desegregation, and federal financial assistance. In order to monitor the progress of civil rights enforcement, Congress granted permanent status to the United States Commission on Civil Rights, established by the Civil Rights Act of 1957.¹⁸

Against this backdrop, it is difficult to imagine how the market could possibly have addressed meaningfully the systematic exclusion of blacks from equal employment opportunities. Professor Epstein is willing to concede that Title VII may have been required to remove the legal and community limitations upon the ability of firms to hire blacks.¹⁹ As the foregoing should establish, however, enactment of federal legislation was not likely to achieve this result overnight. Moreover, given the long history of subjugation and segregation of blacks in education, housing, voting, and employment, there is every reason to believe that many whites continued to view blacks as less acceptable and less worthy candidates for jobs that had traditionally been closed to them. Finally, assuming the very best of intentions of whites and the best of will on the part of blacks, structural impediments presented by segregated education and housing, in particular, severely restricted the scope of blacks' search for employment.

17. See generally *Griffin v. Breckenridge*, 403 U.S. 88 (1971); ATLANTA, GEORGIA, 1960-1961: SIT-INS AND STUDENT ACTIVISM (David Garrow ed., 1989); BIRMINGHAM, ALABAMA, 1956-1963: THE BLACK STRUGGLE FOR CIVIL RIGHTS (David Garrow ed., 1989); DAVID GARROW, PROTEST AT SELMA: MARTIN LUTHER KING, JR. AND THE VOTING RIGHTS ACT OF 1965 (1978); HUGH D. GRAHAM, THE CIVIL RIGHTS ERA: ORIGINS AND DEVELOPMENT OF NATIONAL POLICY, 1960-1972, at 121-57 (1992).

18. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 1975a-1975d, Title V (1988)).

19. FORBIDDEN GROUNDS, *supra* note 1, at 142, 251.

B. From 1964 to the Present

It would be irresponsible to contend that conditions for African-Americans have not improved since 1964. They have in certain respects.²⁰ However, nothing like a sea-change has occurred in the status of blacks relative to whites. Blacks continue to occupy the lower rungs on every socio-economic indicator.²¹ The reasons for this situation are complex but continuing racial discrimination and segregation cannot be overlooked among them. Professor Epstein quite properly notes the success of efforts to desegregate places of public accommodations pursuant to the passage of the Civil Rights Act of 1964.²² However, that experience does not, in my estimation, provide sufficient support for his theory that antidiscrimination legislation should seek only to remove formal and informal constraints on the

20. WILLIAM J. WILSON, *THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY* 109 (1987) ("The most notable gains [of blacks in recent years] have occurred in professional employment, income of married-couple families, higher education, and home ownership."); U.S. BUREAU OF THE CENSUS, *STATISTICAL ABSTRACT OF THE UNITED STATES*: 1993, at 85 (113th ed. 1993) (life expectancy rates improved from 1970-1971); *id.* at 753 (educational attainment; improvement from 1960-1992 in the number of blacks completing 4 years or more of high school and 4 years or more of college). *But see* Tom Morganthau, *Race on Campus: Failing the Test?*, *NEWSWEEK*, May 6, 1991, at 27 (citing American Council on Education statistics, stating that "[o]nly 811 doctorate degrees were awarded to blacks in 1989, compared with 1,056 given in 1979" and that "[i]n 1976, 6.6 percent of all master's degrees went to blacks; only 4.6 percent were awarded in 1989").

21. *THE METROPOLITAN AREA FACT BOOK: A STATISTICAL PORTRAIT OF BLACKS/WHITES IN URBAN AMERICA* 2-12 (Katherine McFate ed. 1988) (noting that in all 48 metro areas included in this fact book, census figures indicate that: unemployment is more than twice as high among blacks than whites; the average earnings and median incomes of black households are lower than those of white households within the same metropolitan areas; significantly fewer blacks than whites own their own homes, and black-owned homes are on average lower in value than white-owned homes; blacks are less likely to be college educated; and blacks are more likely than whites to live in female-headed households and in families with incomes below the poverty level); U.S. BUREAU OF THE CENSUS, *supra* note 20, at 85 (life expectancy rates of blacks are consistently lower than those of whites); *id.* at 153 (the percentage of blacks and whites and years of school completed are significantly lower among blacks, especially in post-secondary schooling); *id.* at 197 (crime victimization rates for crimes against persons from 1973-1991 are consistently higher for blacks than for whites); *id.* at 210 (in 1991 blacks made up 47.3% of state prison inmates); *id.* at 457 (monthly income of blacks, specifically the median income in current dollars, is consistently lower among blacks than whites from 1970-1991); *id.* at 471 (in 1991, 32.7% of black people lived below poverty level, compared to 11.3% of white people); also the U.S. Bureau of the Census has stated:

In the 1990 Census, African-Americans represented 10.4% of the total civil labor force; yet they represented 20.4% of those workers with no earnings in 1989.

Among those without a high school diploma or GED, African-Americans were over-represented as they composed 14.8% of this group. And among those with a college degree or more African-Americans comprise only 6.1%.

U.S. BUREAU OF THE CENSUS, 1990 CENSUS OF POPULATION SOURCE TAPES.

22. *FORBIDDEN GROUNDS*, *supra* note 1, at 127.

employment market. The transitory and impersonal nature of interracial contact in restaurants and hotels differs profoundly from that necessitated in an employment context. Hence white resistance may not be nearly so strong in the former as in the latter.

The Supreme Court long ago acknowledged voting rights as fundamental because they are "preservative of all rights."²³ As previously noted, Congress enacted comprehensive voting rights legislation in 1965, having concluded that earlier efforts in 1957, 1960, and 1964 had done little to alter the systematic denial of blacks' access to the franchise. One of the key features of that legislation was a preclearance mechanism that required covered jurisdictions, mostly in the South, to obtain federal approval before altering their election schemes.²⁴

Although a potentially potent weapon, the scope of the preclearance provision was not clarified by the Supreme Court for several years after the Act went into effect.²⁵ Enforcement also has not been systematic, because of differing philosophies from administration to administration and resource limitations across administrations.²⁶ It also has been the target of a series of legal challenges over the years that have caused enforcement efforts to be suspended for significant periods of time pending resolution of the litigation.²⁷

The slow pace of change in the electoral picture for blacks prompted Congress to extend the Voting Rights Act in both 1970 and 1975, strengthening certain of its provisions and extending its geographic focus significantly to include other parts of the country outside the "Deep South."²⁸ Even with that expansion, however, most of the country was not subject to preclearance requirements. In some jurisdictions that were, no changes were made in electoral schemes that would require submission for federal approval. Although another, more general, provision of the Voting Rights Act prohibiting racial discrimination with respect to voting existed, it

23. *Yick Wo v. Hopkins*, 118 U.S. 351, 360 (1886).

24. Drew S. Days, III, *Section 5 Enforcement and the Department of Justice*, in *CONTROVERSIES IN MINORITY VOTING: THE VOTING RIGHTS ACT IN TWENTY-FIVE YEAR PERSPECTIVE* 52-53 (Bernard Grofman & Chandler Davidson eds., 1992) [hereinafter *CONTROVERSIES IN MINORITY VOTING*].

25. *Id.* at 54-55.

26. *Id.*

27. *United States v. Board of Comm'rs*, 435 U.S. 110, 116-17 (1978).

28. See GRAHAM, *supra* note 17, at 121-57; see generally COMMISSION ON CIVIL RIGHTS, *USING THE VOTING RIGHTS ACT* (1976); David H. Hunter, *The 1975 Voting Rights Acts and Language Minorities*, 25 CATH. U. L. REV. 250 (1976).

was not the subject of much litigation until 1982.²⁹ In that year, Congress amended the law again to provide blacks, and members of other racial minorities, with a more effective tool in challenging electoral schemes that systematically blocked meaningful political participation.³⁰

As the Voting Rights Act approaches thirty, it deserves to be regarded as the most effective piece of federal civil rights legislation on the books.³¹ There have been significant increases in black access to the ballot box and in representation in both elective and appointive offices at all levels of government.³² This success, however, has come only through the coordinated efforts of Congress, the Executive Branch, and the federal judiciary, especially during the last ten years.³³

This is far from saying that the Voting Rights Act has completed the job of making the American political system one of racial inclusion rather than of racial exclusion. Indeed, recent events suggest practices that once effectively excluded blacks from the ballot box and then from elective office have now appeared *within* elective bodies themselves where blacks have recently gained representation.³⁴ Moreover, black electoral successes have occurred primarily in small communities and major metropolitan areas where racial segregation is most pronounced.³⁵ In all too many cases, black elected officials have been given the dubious honor of presiding over communities in economic distress. The jobs have fled, the tax base is dwindling, and infrastructures are crumbling, while demands for social services skyrocket.³⁶

Despite the promise of *Brown* that schools would be desegregated to comply with the Constitution, Southern and Border states employed a host of strategies to frustrate the dismantling of their *de jure* systems.³⁷ Moreover, it became clear in the seventies, although

29. Prior to 1982, Supreme Court rulings had restricted the reach of the Voting Rights Act severely. See *City of Mobile v. Bolden*, 446 U.S. 55 (1980).

30. Laughlin McDonald, *The 1982 Amendments of Section 2 and Minority Representation*, in *CONTROVERSIES IN MINORITY VOTING*, *supra* note 24, at 66, 70-73.

31. Chandler Davidson, *Minority Vote Dilution: An Overview*, in *MINORITY VOTE DILUTION* (Chandler Davidson ed., 1989).

32. *THE QUIET REVOLUTION: THE IMPACT OF THE VOTING RIGHTS ACT* (Chandler Davidson & Bernard Grofman eds., 1994) [hereinafter *THE QUIET REVOLUTION*].

33. *Id.*; see also 28 C.F.R. § 1 (1993).

34. *Presley v. Etowah County Comm.*, 112 S. Ct. 820 (1992).

35. *THE QUIET REVOLUTION*, *supra* note 32.

36. Ronald Smother, *Racially Divisive Campaign in Memphis*, N.Y. TIMES, Oct. 2, 1991, at A14; Lynne Duke, *Denver's First Black Mayor Symbolizes His City's Disregard for Racial Politics*, WASH. POST, July 1, 1991, at A5.

37. See generally U.S. COMM'N ON CIVIL RIGHTS, *DESEGREGATING THE NATION'S SCHOOLS* (1979); U.S. COMM'N ON CIVIL RIGHTS, *STATEMENT ON METROPOLITAN SCHOOL DESEGREGATION* (1977); U.S. COMM'N ON CIVIL RIGHTS, *TWENTY YEARS AFTER BROWN: EQUALITY OF EDUCATIONAL OPPORTUNITY* (1975); U.S. COMM'N ON CIVIL

hotly denied earlier, that intentional segregation of public schools was not merely a Southern phenomenon. Litigation in the North and West, where state-imposed segregation never had existed or had been abolished decades earlier, established that school officials had created and maintained arrangements designed to segregate black and white children from one another.³⁸ By that time, however, demographic shifts had occurred in most urban areas, North and South, creating largely black cities surrounded by largely white suburbs.

Although Supreme Court decisions, beginning in 1971, seemed designed to speed along the process of desegregation within school districts,³⁹ it imposed at the same time almost impossible burdens upon blacks seeking to achieve interdistrict desegregation.⁴⁰ With few exceptions, this has left urban school districts intensely racially-segregated and devoid of resources — because of shrinking tax bases — to provide their students with academic and other support that suburban districts take for granted.⁴¹ More recently, the Court has shown an inclination toward relieving individual school districts of the responsibility for achieving further desegregation on the grounds that forces beyond their control were responsible for resegregation.⁴²

Another provision of the Civil Rights Act of 1964 prohibits discrimination by recipients of federal funds. Although it was used extensively during the Johnson Administration to promote school desegregation, subsequent enforcement has been uneven.⁴³ More recently, Congress amended the provision to overrule a Supreme Court decision that limited its reach.⁴⁴

The Supreme Court and lower federal courts have recognized the reciprocal relationship between school and housing discrimination: schools are built where neighborhoods grow up, but neighborhoods

RIGHTS, FULFILLING THE LETTER AND SPIRIT OF THE LAW: DESEGREGATION OF THE NATION'S PUBLIC SCHOOLS (1976); U.S. COMM'N ON CIVIL RIGHTS, SCHOOL DESEGREGATION IN TEN COMMUNITIES (1973).

38. *Dayton Bd. of Educ. v. Brinkman*, 443 U.S. 526 (1979) (Ohio); *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449 (1979) (Ohio); *Keyes v. School Dist. No. 1*, 413 U.S. 189 (1973) (Denver).

39. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971).

40. *Milliken v. Bradley*, 418 U.S. 717 (1974).

41. See JONATHAN KOZOL, *SAVAGE INEQUALITIES: CHILDREN IN AMERICAN SCHOOLS* (1992); GARY ORFIELD & CAROLE ASHKINAZE, *THE CLOSING DOOR: CONSERVATIVE POLICY AND BLACK OPPORTUNITY* 105-12 (1991).

42. *Freeman v. Pitts*, 112 S. Ct. 1430 (1992); *Board of Educ. v. Dowell*, 498 U.S. 237 (1991).

43. *Abernathy*, *supra* note 16.

44. Civil Rights Restoration Act of 1987, Pub. L. 100-259, § 6, 102 Stat. 28, 35.

also grow up where schools are built.⁴⁵ Consequently, school boards have the power through the location, capacity, and grade level of schools to control their racial composition and to affect surrounding neighborhoods. School and housing authorities have also worked in tandem to preserve segregated communities.⁴⁶ The problem of housing segregation encompasses more than schools, however. In 1968, Congress enacted the Fair Housing Act. Because of its inherent limitations — particularly the absence of an administrative enforcement mechanism — the 1968 Act did not make a significant impact upon intense racial segregation in housing.⁴⁷ Even though it is well-established that patterns of housing segregation are not explained entirely by non-racial factors,⁴⁸ the Fair Housing Act had limited success in helping blacks break through the barriers that separate urban and suburban communities. Congress amended the Act in 1988 to strengthen both its federal government and private enforcement provisions.⁴⁹ As a result, several significant private actions have been successful,⁵⁰ but commentators question whether the Department of Housing and Urban Development has acted vigorously to carry out its new enforcement responsibilities.⁵¹

Attempting to measure the current level of racial discrimination in America, as compared to that in 1954 or 1964, is an illusive exercise. One generalizes at some peril. Reports as fresh as the morning newspaper recount studies showing continuing racial discrimination in housing,⁵² in access to credit,⁵³ in employment,⁵⁴ and education,⁵⁵

45. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 20-21; *Keyes v. School Dist. No. 1*, 413 U.S. 189, 216 (Douglas, J., concurring).

46. *United States v. Yonkers Bd. of Educ.*, 837 F.2d 1181 (2d Cir. 1987), *cert. denied*, 486 U.S. 1055 (1988).

47. Ronald Reagan, Remarks on Signing the Fair Housing Amendments Act of 1988 (Sept. 13, 1988) (transcript available in Department of Justice Library); James A. Kushner, *The Fair Housing Amendments Act of 1988: The Second Generation of Fair Housing*, 42 VAND. L. REV. 1049, 1088 (1989); ROBERT G. SCHWEMM, HOUSING DISCRIMINATION LAW § 24.2 (1993).

48. Karl Taeuber, *The Contemporary Context of Housing Discrimination*, 6 YALE L. & POL'Y REV. 339 (1988).

49. Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1619.

50. *Littlefield v. McGuffey*, 979 F.2d 101 (7th Cir. 1992); *Spann v. Colonial Village, Inc.*, 899 F.2d 24 (D.C. Cir. 1990), *cert. denied*, 498 U.S. 980 (1990); *United States v. Wood*, 780 F.2d 955 (11th Cir. 1986), *cert. denied*, 476 U.S. 1184 (1986); *Woods-Drake v. Landy*, 667 F.2d 1198 (5th Cir. 1982); *Ragin v. Steiner, Clatemand & Assocs.*, 714 F. Supp. 709 (S.D.N.Y. 1989).

51. *Confirmation Hearing of Francis A. Keating, II, Hearings Before the Judiciary Committee of the United States Senate*, 102d Cong., 2d Sess. 84-162 (1992) (testimony of Elaine R. Jones, Kerry A. Scanlon, Lisa Mihaly, and Shanna L. Smith).

52. FAIR HOUSING COUNCIL OF GREATER WASHINGTON, RACE DISCRIMINATION IN THE RENTAL HOUSING MARKET: A STUDY OF THE GREATER WASHINGTON, D.C. AREA (1992); William F. Powers, *\$850,000 Award in Ad Bias Case*, WASH. POST, May 15, 1992, at F1; Christine Spolar, *Bias Suit Nets \$350,000*, WASH. POST, May 28, 1992, at A1; Sue A. Pressley, *Cisneros Moves to Open Up Town in East Texas to Blacks*, WASH. POST, Sept. 15, 1993, at A3; Tracy Thompson, *Study Finds 'Persistent' Racial*

and showing what seems to be a resurgence of hate speech and racial violence.⁵⁶ Polls also reflect, although they should not be viewed as conclusive, significantly negative attitudes of whites toward blacks.⁵⁷ The intensely segregated nature of education and housing is a fact of life in America. Taken as a whole, this picture makes it hard to view racial discrimination as a historical relic. It suggests that past practices of segregation and discrimination continue to affect white attitudes and black conditions today and that those attitudes undoubtedly influence behavior.

Bias in Area's Rental Housing, WASH. POST, Jan. 31, 1991, at D1; Michael Quint, *Racial Gap Found on Mortgages*, N.Y. TIMES, Oct. 22, 1991, at D1; Ann Mariano, *Blacks Having Difficult Time Buying Homes*, WASH. POST, Aug. 11, 1990, at E1; MARGERY A. TURNER ET AL., URBAN INST. & SYRACUSE UNIV., U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT HOUSING DISCRIMINATION STUDY (1991); Scott Minerbrook, *Home Ownership Anchors the Middle Class*, EMERGE 42-48 (1993).

53. David. S. Hilzenrath, *Study Sees Mortgage Loan Bias*, WASH. POST, Mar. 1, 1991, at F1; Quint, *supra* note 52; Mariano, *supra* note 52; Alicia H. Munnell, et al., *Mortgage Lending in Boston: Interpreting HMDA Data*, Oct. 1992; Joel G. Brenner & Liz Spayd, *Bankers Describe Roots of Bias*, WASH. POST, Jun. 8, 1993, at A1; Doug Bailey, *Fed Finds a Racial Gulf in Mortgages*, BOSTON GLOBE, Oct. 22, 1991, at A1; Nathaniel C. Nash, *Panel Is Told of Racial Bias in Lending*, N.Y. TIMES, May 17, 1990, at A18.

54. MARGERY A. TURNER ET AL., URBAN INST., OPPORTUNITIES DENIED, OPPORTUNITIES DIMINISHED: RACIAL DISCRIMINATION IN HIRING (1991) (using testers in a study of employment discrimination against Hispanics); HARRY CROSS, URBAN INST., EMPLOYER HIRING PRACTICES: DIFFERENTIAL TREATMENT OF HISPANIC AND ANGLO JOB SEEKERS (1990) (finding young black job seekers denied jobs offered to similar white job seekers 15% of the time); MARC BENDICK, JR. ET AL., FAIR EMPLOYMENT COUNCIL OF GREATER WASHINGTON, INC., MEASURING EMPLOYMENT DISCRIMINATION THROUGH CONTROLLED EXPERIMENTS (rev. 1993) (using employment "testing" or "auditing" to discover that hiring discrimination remains far more prevalent than is commonly assumed); *Hiring Discrimination Against Young Black Men*, URB. INST. POL'Y & RES. REP., Summer 1991, at 4; Clare Ansberry, *Few Firms Address Racism on the Job*, WALL ST. J., May 8, 1992, at B1; Filomena Sayao, *Black Executives: Racism No. 1 Barrier*, USA TODAY, Oct. 29, 1991, at 6B; *A Glass Ceiling Thick as Lead: New Study Shows Women and Minorities Barred from Rising Very High Up Corporate Ladder*, L.A. TIMES, Aug. 12, 1991, at B4; Joan E. Rigdon & Carol Hymowitz, *For Black Men, Success Resolves Few Problems*, WALL ST. J., May 8, 1992, at B1.

55. *Freeman v. Pitts*, 112 S. Ct. 1430 (1992).

56. CARNEGIE FOUND. FOR THE ADVANCEMENT OF TEACHING, CAMPUS LIFE: IN SEARCH OF COMMUNITY 25, 26-34 (1990); Charles R. Lawrence, III, *If He Hollers Let Him Go: Regulating Racist Speech On Campus*, 1990 DUKE L.J. 431; Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2370-73 n.245-56 (1989).

57. See TOM W. SMITH, NATIONAL OPINION RESEARCH CTR., ETHNIC IMAGES, GENERAL SOCIAL SURVEY TOPICAL REPORTS NO. 19 (1990) (examining the images whites have of various ethnic groups); Peter Appleborne, *Racial Divisions Persist 25 Years After King Killing*, N.Y. TIMES, Apr. 4, 1993, at 16; Mark A. Fossett & K. Jill Kiecolt, *The Relative Size of Minority Populations and White Racial Attitudes*, 70 SOC. SCI. Q. 4 (1989); NATIONAL CONFERENCE OF CHRISTIANS & JEWS, TAKING AMERICA'S PULSE (1992).

It is against this backdrop that Professor Epstein would have us allow the market to operate free of the constraints of Title VII. I find it inconceivable that such an arrangement would be more favorable to blacks seeking employment than is the current, regulated system. Intentional acts of employment discrimination to one side, although there are enough of those, it is difficult to identify what strong reasons white employers would have to care whether blacks are hired. Whether arbitrary barriers limit their eligibility or whether education and housing segregation restrict the equal access of blacks to jobs should be of no moment to them so long as ample pools of white applicants exist.

III. TITLE VII AS IT ACTUALLY OPERATES

Professor Epstein's second strategic move in aid of his overall thesis is to offer a caricatured portrait of Title VII. He would have the reader believe that, in the nearly thirty-eight years since its passage, the statute has grown into a monstrous restraint on employer autonomy, a promoter of explicit discrimination against whites, and an ironic limit on employment opportunities for blacks. On the contrary, until the Supreme Court's about-face decisions during the 1988-89 Term,⁵⁸ Title VII doctrine had been developing in a way that balanced, fairly and sensibly, the imperative of addressing real problems of racial discrimination and exclusions, on the one hand, with the legitimate needs of employers to maintain some control over the employment process on the other hand. In passing the Civil Rights Act of 1991, Congress restored that balance.⁵⁹

Before discussing Title VII doctrines prior to 1989, I think that it may be helpful to describe more clearly than Professor Epstein has done in his book the several types of employment discrimination to which the statute is addressed. The first is *disparate impact discrimination* where an employer uses a screening device that has a disproportionate impact on a racial group that cannot be justified in terms of the requirements of the job in question. The second is *individual disparate treatment discrimination* in which a person is denied consideration for employment or promotion equal to others similarly qualified because of that person's race or other characteristic prohibited by Title VII. The third is *class disparate treatment*, or pattern or practice, *discrimination* where an employer systematically denies equal treatment to a group of people based upon prohibited criteria

58. See e.g., *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989); *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900 (1989).

59. H.R. Con. Res. 9542-49, 102d Cong., 1st Sess. (1991) (remarks of Congressman Hyde); George Bush, Statement on Signing the Civil Rights Act of 1991 (Nov. 22, 1991), in 226 DAILY LAB. REP., at D-1.

under Title VII. Professor Epstein's discussion of Title VII case law conflates the first, disparate impact, and the third, class disparate treatment, in a way that masks the theoretical and practical distinctions between the two models.

A. Disparate Impact

Professor Epstein argues that the Supreme Court's 1971 decision in *Griggs v. Duke Power Co.*⁶⁰ ignored both the language and legislative history of Title VII when it held that practices having a disparate impact on certain groups of applicants could violate the statute.⁶¹ He contends, as have others over the years, that Title VII was designed to deal with only intentionally discriminatory practices, not those that simply had a discriminatory effect. Since Congress incorporated the *Griggs* doctrine into Title VII in the Civil Rights Act of 1991,⁶² the debate over whether the Court "got it right" twenty-three years ago is, in some senses, beside the point. What really matters now, it seems to me, is whether the *Griggs* doctrine represents a fair manner of sorting out considerations of remedying discrimination while preserving certain employer prerogatives.

It is certainly true that *Griggs* was an unprecedented reading of the statute. However, the interpretative principle that the Court invoked was not novel. In both voting rights cases and earlier lower court decisions under Title VII, federal judges had embraced an "anti-freezing" principle.⁶³ That principle required that, as a matter of equity, courts reject facially even-handed requirements that built upon prior racial inequality, even without any finding that the change was motivated by discriminatory intent. To do otherwise, they held, would be to carry over such past discrimination well into the future, since blacks and whites would be unequally prepared to compete under the new "equality."⁶⁴

What the Court faced in *Griggs* was precisely that situation: given the history of discrimination in North Carolina against blacks, particularly in its racially-segregated public schools, it was unlikely that blacks would have educational credentials or test-taking skills equal

60. 401 U.S. 424 (1971).

61. *Id.* at 431 (holding that Title VII "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation").

62. Pub. L. No. 102-166, 105 Stat. 1071 (1991).

63. *Louisiana v. United States*, 380 U.S. 145 (1965) (voting); *Quarles v. Philip Morris, Inc.*, 279 F. Supp. 505 (E.D. Va. 1968) (employment).

64. *United Papermakers & Paperworkers v. United States*, 416 F.2d 980 (5th Cir. 1969).

to whites.⁶⁵ Of course, Duke Power Co., the employer, was not found to have been responsible for the educational deficits experienced by blacks. In that respect, the *Griggs* facts were distinguishable from those in the earlier "anti-freezing" cases where the employers or state officials were properly charged with disadvantaging blacks. Nevertheless, assuming, as the Court properly did, that Title VII was designed to open up opportunities previously denied to black workers, it was fair to ask the employer to shoulder a part of the burden for achieving progress in that regard. But the Court had several options.

One response would have been for the Court to hold that disparate impact, irrespective of its severity, would not constitute a violation of Title VII. Rejected applicants would be required to establish the existence of discriminatory intent. Another would have been to accept proof of disparate impact as evidence of a violation but require the applicants to carry the burden of persuasion, or lose for failure to do so, of demonstrating that the screening device at issue was not job-related. The third approach, the one actually chosen by the Court, was basically the second just mentioned, except that the employer would have the burden of persuasion of demonstrating job-relatedness.

The process of allocating evidentiary burdens in the law is not a scientific exercise but rather one affected significantly by social realities and societal objectives.⁶⁶ In the 1965 Voting Rights Act, for example, Congress imposed on jurisdictions covered by the preclearance provisions the burden of showing that their proposed electoral changes both were not intended to discriminate and did not have any discriminatory effect.⁶⁷ *Griggs* pitted Duke Power Co.'s purported need for employees with high school diplomas or equivalent scores on general ability tests against the job prospects of black applicants. Under these circumstances, the Court struck the balance in favor of the side in the worse position to determine the validity of these barriers to their employment. Employers were not prohibited from using tests altogether, but were simply required to demonstrate that their value outweighed the societal loss occasioned by foreclosing job opportunities to black workers capable of performing the job in question. Such an allocation would, at the very least,

65. *Griggs*, 401 U.S. at 430 & nn.5-6. The Court decided *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), the same year.

66. *Keyes v. School Dist. No. 1*, 413 U.S. 189, 200 (1973); see also Robert Belton, *Causation and Burden-Shifting Doctrines in Employment Discrimination Law Revisited: Some Thoughts on Hopkins and Wards Cove*, 64 TUL. L. REV. 1359 (1990); Robert Belton, *Burdens on Pleading and Proof in Discrimination Cases: Toward a Theory of Procedural Justice*, 34 VAND. L. REV. 1205 (1981).

67. Drew S. Days, III & Lani Guinier, *Enforcement of Section 5 of the Voting Rights Act*, in *MINORITY VOTE DILUTION* (Chandler Davidson ed., 1989).

discourage employers from adopting tests without very much thought and encourage them to analyze thoroughly their genuine needs for such screening devices in the face of their discriminatory impact.⁶⁸

Moreover, whatever one's views on the utility of general ability testing, the *Griggs* doctrine seems even fairer, as a matter of social policy, where it serves to remove other barriers to employment, not involving pencil and paper tests, that have little or no relation to the fitness of black applicants for certain jobs. Yet, before *Griggs*, they stood as significant limits on the ability of blacks to find employment.⁶⁹ Professor Epstein would, apparently, accept significant disparate impact of tests in exchange for relatively modest returns in terms of test validity.⁷⁰ Presumably, he would also decry the applicability of *Griggs* in non-test situations.

B. Individual Disparate Treatment

One would have expected the Supreme Court's first consideration of Title VII's scope to be in a case where the plaintiff claimed to have been the victim of intentional racial discrimination. However, it was not until 1973, two years after the *Griggs* disparate impact decision, that the Court decided the case of *McDonnell-Douglas Corp. v. Green*.⁷¹ There it held that the plaintiff would have to establish, in order to make out a prima facie case of discrimination, that he was a member of a racial minority, that he applied and was qualified for the job in question, that he was rejected despite his qualifications, and that after his rejection, the employer kept the position open and continued to seek applications from persons with qualifications like the plaintiff's.⁷² Once the plaintiff made out a prima facie case, the employer's responsibility was to come forward with a legitimate, non-discriminatory justification for rejecting the plaintiff.⁷³ In the final stage, the plaintiff could attempt to prove that the employer's

68. *Griggs v. Duke Power Co.*, 420 F.2d 1225, 1239 (4th Cir. 1970) (Sobeloff, J., dissenting in part), *rev'd*, 401 U.S. 424 (1971).

69. BARBARA L. SCHLEI & PAUL GROSSMAN, *EMPLOYMENT DISCRIMINATION LAW* 1987-1989, at Supp. 21-23 (N. Thompson Powers ed., 2d ed. 1991); *Gregory v. Litton Sys., Inc.*, 472 F.2d 631 (9th Cir. 1972).

70. *FORBIDDEN GROUNDS*, *supra* note 1, at 212-16.

71. 411 U.S. 792 (1973).

72. *Id.* at 802.

73. *Id.*

justification was in fact a pretext for discrimination.⁷⁴ Unlike the situation in disparate impact cases, in individual disparate treatment cases the burden of persuasion would remain with the plaintiff.⁷⁵

Professor Epstein seems to be willing to live with individual disparate treatment cases, but largely because he views them as far less harmful to employers' autonomy than are disparate impact cases. His instincts are certainly right. In individual disparate treatment cases, the employer can set his or her job requirements as high as the stars so long as they are applied equally to white and black applicants alike. Absent evidence of disparate impact, there is no duty upon the employer to establish that the requirements are job-related. Although it may seem somewhat odd that the plaintiff's *prima facie* case burden is rather minimal, the employer's burden of explaining his conduct is equally minimal. The allocation allows the court to entertain two plausible theories about the facts at the same time. First, the plaintiff's burden posits the existence of a rational employer seeking "efficient and trustworthy workmanship."⁷⁶ As the Court remarked in a subsequent case in this regard:

And we are willing to presume this [*prima facie* case] largely because we know from our experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting. Thus when all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, who we generally assume acts only with *some* reason, based his decision on an impermissible consideration such as race.⁷⁷

Consequently, once an applicant has established his or her qualifications for the job, the obvious non-discriminatory reason, lack of qualification, has been removed from the picture. Second, the employer's burden of production — to come forward with a legitimate non-discriminatory justification — acknowledges that some employers may act irrationally or have reasons for denying employment to the plaintiff that are dictated by factors unrelated to technical competence, such as family relationship or even bureaucratic inefficiency.⁷⁸ In so

74. *Id.* at 804.

75. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981).

76. *McDonnell-Douglas*, 411 U.S. at 801.

77. *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978) (emphasis in original).

78. *Cunningham v. Housing Auth. of Opelousas*, 764 F.2d 1097 (5th Cir. 1985) (upholding decision that female plaintiff failed to demonstrate intentional discrimination in hiring case because the less qualified male who got the position was hired as repayment for political support he had lent to the mayor); *Autry v. North Carolina Dep't of Human Resources*, 820 F.2d 1384 (4th Cir. 1987) (holding that promotion of white employee, who was friend of interviewer who made promotion decision and daughter of Bank Commission member with political ties, did not raise inference of intentional discrimination against unpromoted black employee); *Holder v. City of Raleigh*, 867 F.2d 823 (4th Cir. 1989) (holding that Title VII does not apply to disparate treatment claims

doing, the Court has achieved a reasoned balance between an employer's desire to hire whomever he or she wants with the goal of "fair and neutral employment and personnel decisions."⁷⁹

Moreover, the tripartite allocation of evidentiary burdens announced by *McDonnell-Douglas* is a construct that rarely mirrors the actual trial of such cases.⁸⁰ The applicant need not rely solely upon the prima facie case elements identified by the Court but may, and probably will, introduce evidence of pretext. The employer, through cross-examination, may challenge the applicant's qualifications before his or her turn comes to respond. The applicant may utilize statistics with respect to the employer's overall hiring of blacks to establish pretext in his or her individual case of racial discrimination. Such evidence provides a context within which the judge can evaluate the individual claims. In turn, the employer may rely upon his or her overall hiring practices, including affirmative action plans, to rebut evidence pointing to discrimination in the applicant's individual case. In general, as one might imagine given the extent to which individual disparate treatment cases are no more than swearing contests between applicant and employer, such cases are not often successful.⁸¹ Professor Epstein is correct in viewing them as only minor drags on employer autonomy.⁸²

Finally, contrary to Professor Epstein's suggestion, the *McDonnell-Douglas* individual disparate treatment model has been applied not only to racial minorities but to whites as well.⁸³ It has long been established that Title VII applies equally to whites and blacks.⁸⁴ Courts have, however, been required to adjust the *McDonnell-Douglas* approach to those situations where, contrary to what one would expect based upon America's history of racial discrimination against blacks, there is some objective evidence that an employer would actively attempt to exclude qualified whites from consideration.⁸⁵

based on promotion decisions motivated by favoritism towards relatives); *Keyes v. Secretary of the Navy*, 853 F.2d 1016 (1st Cir. 1988).

79. *McDonnell-Douglas*, 411 U.S. at 801.

80. *United States Postal Servs. Bd. of Governors v. Aikens*, 460 U.S. 711 (1983).

81. Theodore Eisenberg & Sheri L. Johnson, *The Effects of Intent: Do We Know How Legal Standards Work?*, 76 CORNELL L. REV. 1151 (1991).

82. FORBIDDEN GROUNDS, *supra* note 1, at 181.

83. *Parker v. Baltimore & Ohio R.R.*, 652 F.2d 1012, 1017 (D.C. Cir. 1981).

84. *McDonald v. Santa Fe Ry.*, 427 U.S. 273 (1976).

85. *Parker*, 652 F.2d at 1017-18.

C. Class Action Disparate Treatment

There are similarities between class action disparate treatment, the third form of discrimination addressed by Title VII, and disparate impact, particularly in the reliance upon statistics as a form of proof. Yet statistics play a different role in each. In disparate impact cases, statistics are used to establish that a screening device is producing a greater discriminatory effect with respect to black applicants, for example, than white applicants. In class action disparate treatment cases, statistics are used to suggest that hiring patterns significantly lower than what one would normally expect in view of the labor pool are the result of intentional discrimination rather than chance.

The burden on the plaintiff class in such "pattern or practice" cases is to persuade the court that "racial discrimination was the company's standard operating procedure — the regular rather than the unusual practice."⁸⁶ It is really the use of statistics in class action disparate treatment cases that has drawn frequent criticism. The critics take the position that differential hiring rates do not necessarily suggest racial discrimination because it is common knowledge that job interests vary, for example, from group to group. Consequently, one should not expect that a particular work force will mirror the racial group proportions existing in the labor pool.⁸⁷ I assume that Professor Epstein would have expressed similar views, if he had addressed explicitly this type of case in his book.

In *Teamsters*, the Supreme Court offered the following pragmatic response to that criticism: "[A]bsent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired."⁸⁸ This proposition is certainly open to challenge. The Court did not mean to suggest that it was anything more than one element of proof that a judge might rely upon when faced with the task of determining the presence or absence of intentional discrimination. Rather, it resolves the question of which party — the plaintiffs who allege discrimination or the employer who denies any bias — should have the responsibility for explaining what reasons, other than discrimination, would likely account for significant disparities between black labor pool and workforce statistics.

In view of the history of racial discrimination recounted above in

86. *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 336 (1977).

87. Terry Eastland, *The Case Against Affirmative Action*, 34 WM. & MARY L. REV. 33, 36-37 (1992); TERRY EASTLAND & WILLIAM J. BENNETT, *COUNTING BY RACE* (1979); Thomas Sowell, "Affirmative Action": *A Worldwide Disaster*, COMMENTARY, Dec. 1989, at 21; THOMAS SOWELL, *CIVIL RIGHTS: RHETORIC OR REALITY* (1984).

88. *Teamsters*, 431 U.S. at 340 n.20.

Part II, the appropriate party to provide the court with explanations should be the employer. The Court properly held in *Teamsters*, consequently, that the employer was in the best position to explain why white drivers, but not black, liked over-the-road (long distance) assignments that paid better than in-town jobs.⁸⁹ This is not to say that plaintiffs have been able to rely upon general population statistics in every case to raise inferences of racial discrimination. On the contrary, the Court has made clear that where special qualifications or other factors, such as geography, serve to limit the relevance and probativeness of general population statistics, more appropriately tailored demographic data must be proffered.⁹⁰ Moreover, the existence of anecdotal evidence is usually crucial to the success of class disparate treatment cases. According to the Court, they help to bring "the cold numbers convincingly to life."⁹¹

Professor Epstein's confusion between disparate impact and class action disparate treatment cases, most notably in his discussion of the cases involving multiple regression analysis to prove discrimination,⁹² causes him to misrepresent the burdens employers must carry. In those and other class action disparate treatment cases, the *plaintiffs* have the burden of establishing discriminatory intent. Unlike in the true, *Griggs*-type disparate impact cases, proof of discriminatory effect does not satisfy the plaintiffs' evidentiary burden.⁹³ Overall, contrary to Professor Epstein's assertions, the three Title VII doctrines described above reflect a desire by the Supreme Court to advance the cause of racial equality in the workplace while maintaining a healthy respect for the importance of traditional employer prerogatives.

D. Affirmative Action

In his discussion of "affirmative remedial action,"⁹⁴ Professor Epstein compounds the errors already mentioned with respect to his casual discussion of the history of racial discrimination and confusion over the difference between disparate impact and class disparate

89. *Id.* at 359-60.

90. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 650-51 (1989); *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 310-11 (1977).

91. *Teamsters*, 431 U.S. at 339.

92. *FORBIDDEN GROUNDS*, *supra* note 1, at 367-91.

93. *Bazemore v. Friday*, 478 U.S. 385, 398 (1986) (Brennan, J., concurring in part) (holding that plaintiffs must establish that racial discrimination was the standard operating procedure).

94. *FORBIDDEN GROUNDS*, *supra* note 1, at 405-11.

treatment cases. It is true that he mentions that remedial affirmative action (my term) is designed "to remedy acts of discrimination that the statute itself renders unlawful."⁹⁵ This brief acknowledgement, however, leaves untold (and unknown to those unfamiliar with this field of law) the stories of often-persistent refusals by employers to rectify proven cases of intentional racial discrimination.

The pattern has been as follows. Black plaintiffs sue the employer alleging intentional racial discrimination. The employer denies the allegations but is ultimately found liable under Title VII. After a series of unsuccessful appeals, the employer is enjoined by the trial court from discriminating further against blacks and ordered to engage in a program of active recruitment to integrate its workforce. Several years pass with very little change in the racial composition of the employer's workforce.

The employer's explanation is that he or she is looking as hard as anyone could ask but simply cannot find any blacks qualified for the job or cannot convince those that are qualified to accept employment. According to the employer, its recruitment activities have been a model of good faith efforts to comply with Title VII. The court's view is often otherwise where the employer's operation does not require sophisticated skills of its workers, there are relatively few black employees, and the black labor pool of presumptively qualified candidates is relatively large.

It is at this point that courts have resorted to goal and timetable, and sometimes quota, remedies. Hence, employers are directed to achieve a certain percentage of black workers by a given time. Even where such orders are issued, employers retain the right to return to court to report that the goals have not been reached and to explain the reasons for failure. Of course, evidence that an employer has established no formal mechanism for identifying, attracting, and evaluating black candidates will serve to undermine that employer's credibility. The important point, however, is that this process does not require employers to hire "by the numbers" without regard to availability or qualifications, as has often been suggested by critics of this form of affirmative action.⁹⁶

Failure by the employer to achieve goals and timetables may prompt the court to impose even more stringent requirements,

95. *Id.* at 405.

96. Carol H. Falk & Urban C. Lehner, *Affirmed in Part, Reversed in Part*, in *COUNTING BY RACE: EQUALITY FROM THE FOUNDING FATHERS TO BAKKE AND WEBER* 170 (Terry Eastland & William J. Bennett eds., 1979); William B. Reynolds, *An Equal Opportunity Scorecard*, 21 GA. L. REV. 1007, 1036-39 (1987); Eastland, *supra* note 87, at 37; Sowell, *supra* note 87, at 21; Paul C. Roberts, *America's War on Success*, NAT'L REV., Aug. 23, 1993, at 50.

namely, one-for-one or one-for-two black-white hiring or promotion.⁹⁷ Once again, this form of remedy does not mandate the employer's ignoring qualifications. Presumably, this arrangement is what critics refer to as the imposition of "quotas" in the workplace.⁹⁸ The word "quota" has a justifiably pejorative connotation in view of its association with flat limits on the number of Jews or other ethnic group members accepted for employment or admission to institutions of higher education, not only in Nazi Germany but also in our own country only a few decades ago.⁹⁹ It should be evident, however, that the form of remedial affirmative action bears little resemblance to those quotas of the past. Such court orders represent a measured response to a history of proven discrimination and employer resistance to less drastic remedial alternatives.

Goals and timetables and, even more so, the one-for-one remedial orders present the question, as Professor Epstein points out,¹⁰⁰ of whether so-called non-victims of discrimination should benefit from remedial affirmative action orders. Under normal circumstances, remedies might well be limited to actual victims of discrimination such as blacks who applied for employment but were rejected, those who were employed but denied equal terms or conditions to those of whites, or more problematic than these, blacks who would have applied for jobs but did not because of the employer's reputation as a discriminator.¹⁰¹ However, where an employer has engaged in "particularly long standing or egregious discrimination,"¹⁰² limiting relief to actual victims may not suffice. For one thing, many of the actual victims may have gone to their graves or may have taken other jobs from which they are reluctant to move for a variety of reasons.

Moreover, employers guilty of persistent or growing patterns of

97. *United States v. Paradise*, 480 U.S. 149, 171-76 (1987).

98. SOWELL, *supra* note 87, at 41; see HERMAN BELZ, *EQUALITY TRANSFORMED: A QUARTER CENTURY OF AFFIRMATIVE ACTION* 214-15 (1991); Kingsley R. Browne, *Comparable Worth: An Impermissible Form of Affirmative Action?*, 22 LOY. L.A. L. REV. 717, 732 n.95 (1989) (criticizing the distinction between goals and quotas as without meaning); Kingsley R. Browne, *The Civil Rights Act of 1991: A "Quota Bill," a Codification of Griggs, a Partial Return to Wards Cove, or All of the Above?*, 43 CASE W. RES. L. REV. 287, 299 n.44 (stating that the Court upheld a quota system in *United Steel Workers v. Weber*, 443 U.S. 193, 197 (1979)).

99. Alan M. Dershowitz & Laura Hanft, *Affirmative Action and the Harvard College Diversity-Discretion Model: Paradigm or Pre-Text?*, 1 CARDOZO L. REV. 379 (1979).

100. FORBIDDEN GROUNDS, *supra* note 1, at 408-09.

101. *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 367 (1977).

102. *Local 28, Sheet Metal Workers Int'l Ass'n v. Equal Employment Opportunity Comm'n*, 478 U.S. 421, 448 (1986).

racial discrimination have institutional problems that can be addressed effectively only by institutional, not individual, remedies. Goals and timetables, and even what I am prepared to call quotas under my own definition, help alter the public image of the employer as a professional discriminator and promote institutional change from within. To do less is likely to result in situations where, as the Supreme Court has noted, "informal mechanisms may obstruct equal employment opportunities"¹⁰³ after formal discrimination has ceased.

The central question in this respect must be whether the remedy, whatever its name, responds properly to the discriminatory practices that have been proven. Although these remedies are grounded in the facts of discriminatory practices in each case, Professor Epstein improperly dismisses them as a "restructuring of society that takes into account the interests of nonparties to the litigation in fashioning remedies for breach."¹⁰⁴ Since these types of remedies are limited to cases of "long standing or egregious discrimination," they are, by definition, not available where the only violation is one of disparate impact.

E. Intrasocial Wealth Redistribution

Professor Epstein posits that another, in his long list, of Title VII's untoward consequences has been the intrasocial transfer of wealth between well-off and poorer blacks. He suggests that in the same way that increasing the minimum wage predictably decreases job opportunities for those with fewer skills, Title VII advantages better educated, middle class blacks to the disadvantage of lower class blacks.¹⁰⁵ It is difficult to know what to make of such a wholly speculative claim. First, one can reasonably assert that the transfer, if it in fact occurs, is rather modest, given the limited wealth accumulation in the black community overall.¹⁰⁶ Second, it is highly inaccurate to view middle class blacks and middle class whites as fungible, in view of the significant disparity between the two groups in terms of

103. *Id.* at 449.

104. FORBIDDEN GROUNDS, *supra* note 1, at 408.

105. *Id.* at 259-66.

106. WILLIAM P. O'HARE, JOINT CENTER FOR POLITICAL STUDIES, WEALTH AND ECONOMIC STATUS: A PERSPECTIVE ON RACIAL INEQUITY (1983); Lenneal J. Henderson, *Empowerment Through Enterprise: African American Business Development*, in THE STATE OF BLACK AMERICA 102 (1993) (discussing the dependency of African American businesses on public support, citing to the disparity between blacks and whites in wealth ownership); Melvin J. Oliver & Thomas M. Schapiro, *Race and Wealth*, REV. OF BLACK POL. ECON., Spring 1989, at 5, 17 (noting that black households have one-fourth the net worth and 11% of the net financial assets of white households).

wealth accumulation as opposed to income.¹⁰⁷ Third, and more important, however, Professor Epstein's assertions attribute to Title VII effects that undoubtedly have multiple causes.

Certainly blacks with competitive skills and education have been able to benefit from passage of Title VII and its enforcement. In contrast, significant segments of the black community who were poor and uneducated before Title VII have not improved their lot since the statute's passage. The failure of these blacks to advance is unlikely to have been a consequence of Title VII but rather of the absence of social programs designed to improve the conditions that leave them at the margins of the American economy. Inadequate housing, inferior educational facilities, minimal health care, and the deterioration of both physical and social institutions in our cities, not Title VII,¹⁰⁸ better explain the widening gap between middle class and poor blacks.

Professor Epstein's criticism of Title VII in this respect resembles one frequently levelled at affirmative action generally. The contention is that affirmative action plans have not benefitted poor blacks but have simply allowed middle class blacks, many of whom are undeserving of any special consideration because of their race, to obtain scarce employment and higher educational opportunities.¹⁰⁹ This criticism is not entirely true, since blacks in blue collar industries have been able to receive employment and training that would not have been available to them had Title VII and affirmative action programs not existed.¹¹⁰ Black students from rather humble socio-economic backgrounds have also enjoyed expanded educational horizons for the same reason.¹¹¹

More important, however, is the fact that affirmative action programs were not designed to address the problem of poor people. Rather, their objective was to help remedy the effects of discrimination against blacks because of their race. Many American institutions still reflect a lack of diversity along socio-economic lines, with

107. O'HARE, *supra* note 106, at 3-8.

108. WILSON, *supra* note 20; WILLIAM J. WILSON, *THE DECLINING SIGNIFICANCE OF RACE: BLACKS AND CHANGING AMERICAN INSTITUTIONS* (1978).

109. See Abigail M. Thernstrom, 'Voting Rights' Trap, 193 NEW REPUBLIC, Sept. 2, 1985, at 21-23.

110. GERTRUDE EZORSKY, *RACISM AND JUSTICE: THE CASE FOR AFFIRMATIVE ACTION* 63-65 (1991).

111. WILSON, *supra* note 20, at 115 (citing William L. Taylor, *Brown, Equal Protection, and the Isolation of the Poor*, 95 YALE L.J. 1700, 1714 (1986)).

the poor less represented the more elite the institution.¹¹² In contrast, these same institutions, prior to Title VII and affirmative action, had very little or no black presence, irrespective of blacks' socio-economic background.¹¹³ Affirmative action plans have been somewhat successful in remedying the absence of the black middle class from employment and educational opportunities previously available only to middle class whites. Defenders of affirmative action who characterize them as "poverty" programs are simply mistaken or disingenuous.

There is some irony, moreover, in this criticism of Title VII and affirmative action as a middle class black windfall, since the same critics also argue that selection should be based upon merit, not upon race. Blacks most likely to have educational and employment qualifications competitive with whites are going to be middle class. Hence, a "Catch-22" situation arises. If affirmative action programs were targeted to poor blacks, they will be less likely as a group to have sufficient credentials to be competitive. Indeed, if the concern is for that segment of the black community popularly denominated the "underclass," it is exceedingly doubtful that affirmative action programs offer any relief.¹¹⁴ But if affirmative action programs focus on race and competence, middle class blacks are more likely to benefit.

Finally, some whites and blacks who have misgivings about affirmative action altogether find attractive the idea of establishing programs, particularly in university admissions, where poverty and competence are the only criteria.¹¹⁵ They reason that, because blacks are disproportionately poor, such programs will inevitably benefit the black community significantly without race being any consideration whatsoever. The problem with this approach, however, is that there

112. COOPERATIVE INSTITUTIONAL RESEARCH PROGRAM, *THE AMERICAN FRESHMAN NATIONAL NORMS FOR FALL 1993*, at 84 (1993) (finding that 49.2% of entering freshman of the most selective nonsectarian institutions had an estimated parental income of \$75,000/year; and 60% had an estimated parental income of \$60,000/year while the least selective institutions had a freshman enrollment of 20.9% whose estimated parental income was \$75,000 and 33.1% whose estimated parental income was \$60,000).

113. *Race in the Workplace*, *BUS. WK.*, July 8, 1991, at 50 (finding that Black presence at companies with 100 or more employees has increased significantly at all levels, from 1966 until 1989); *A COMMON DESTINY: BLACKS AND AMERICAN SOCIETY* 336 (Gerald D. Jaynes et al. eds., 1989) (stating that the number of Blacks with 12 or more years of education increased substantially from 1940-1980); William L. Taylor, *Brown, Equal Protection, and the Isolation of the Poor*, 95 *YALE L.J.* 1700, 1705 (1986); ANDREW HACKER, *TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL* 147 (1992); DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM*, 142 (1992).

114. HACKER, *supra* note 113.

115. Paul Starr, *Civil Reconstruction: What to Do Without Affirmative Action*, *AM. PROSPECT*, Winter 1992, at 7, 10; William J. Wilson, *Race-Neutral Programs and the Democratic Coalition*, *AM. PROSPECT*, Spring 1990, at 78, 79; WILSON, *supra* note 20, at 121-24.

are, in raw numbers, more poor whites than blacks in America. Consequently, it is quite likely that, in many instances, such "poverty-only" programs would select only whites.¹¹⁶

What all of this means is that those who resort to hyperbole both in defending or attacking Title VII and affirmative action with respect to their impact upon poor blacks are misguided. For they demand results that were never intended and are far beyond the ability of one statute, or a set of targeted race-conscious programs, to achieve.

CONCLUSION

Forbidden Grounds is undeniably a brilliant, forcefully argued brief for Professor Epstein's deregulatory mission. But after all is said and done, insofar as racial discrimination in employment is concerned, it lacks something very important to those of us who care deeply about ridding America of this ugly social practice. It lacks reality.

116. The problem with this approach, however, is that, according to SAT scores, poverty-only affirmative action in college admission will mainly benefit whites and Asians, since they have better scholastic records. See HACKER, *supra* note 113, at 138, 141, 146 (discussing SAT score distribution, noting that among low-income students, blacks do most poorly and that black students from better-off homes, whose parents earn between \$50,000 to \$60,000 do not do well on the SAT either, barely matching Asians from families in the \$10,000 to \$20,000 range).

